Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1442

JIMMY-RICHARD CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit

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PRAYER

Petitioner Jimmy-Richard Co., Inc., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 15, 1976.

JURISDICTION

The Decision of the United States Court of Appeals for the District of Columbia Circuit affirming the Order of the National

Labor Relations Board with the dissent of Judge George E. MacKinnon was handed down on December 8, 1975. Petitioner duly and timely filed its "Petition for Rehearing or, in the Alternative, to Transfer to the Court En Banc" which was denied by said Court of Appeals on January 13, 1976. The Judgment of the United States Court of Appeals for the District of Columbia Circuit which is to be reviewed herein was entered on January 15, 1976.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 2350 (a).

CITATIONS TO OPINIONS BELOW

The majority opinion together with the dissenting opinion of Judge George E. MacKinnon of the three judge panel of the United States Court of Appeals for the District of Columbia Circuit are not yet reported and are printed in Appendix A hereto, infra, page A-1. The Decision and Order of the National Labor Relations Board affirming the rulings, findings, conclusions and adopting the recommended Order of the Administrative Law Judge together with the Decision of the Administrative Law Judge are reported at 210 NLRB No. 134 and are printed in Appendix B hereto, infra page A-18.

QUESTION PRESENTED

Whether the statement by an employer, in connection with a union organizational campaign, that, if the union comes into the plant and by its demands increases the expenses of the company to a point that it would no longer be profitable to operate the company and the company would, therefore, have to close the plant, justifies an order to bargain rather than a new election, particularly in view of union misrepresentations in ob-

taining authorization cards and the union's failure to hold a majority of the employees' authorization cards at the time it demanded recognition by the company.

STATUTE INVOLVED

Sections 8(a)(1) and 8(a)(5) of the Labor Management Relations Act, 29 U.S.C. §§ 158(a)(1) and (a)(5) provide:

> § 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9(a) of the Labor Management Relations Act, 29 U.S.C. § 159(a) provides:

> § 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representatives as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Question presented: Whether the proper remedy to be applied by the National Labor Relations Board in setting aside an election result due to employer misconduct during a representation election campaign is an order to bargain, as opposed to an order for a new election, when there is evidence that a fair rerun election is feasible and when the alleged wrongful conduct of the employer is minimal and when the Union did not have a majority of authorization cards at the time of its demand upon the employer for recognition and when the Union made certain false representations in connection with the solicitation of authorization cards.

STATEMENT

This Petition for a Writ of Certiorari seeks to review the two to one decision (with vigorous dissent of Judge MacKinnon) and judgment rendered by the United States Court of Appeals for the District of Columbia Circuit. Said decision and judgment was rendered pursuant to a Petition for review and an application for enforcement of an order of the National Labor Relations Board. The said Court of Appeals had jurisdiction over those proceedings in accordance with 29 U.S.C. Section 160(e)(f).

This case arose from the attempt by the Amalgamated Clothing Workers of America AFL-CIO (hereinafter "Union") to organize the plant of Petitioner, Jimmy-Richard Co., Inc. (hereinafter "Company") located in Hawkinsville, Georgia in 1973. Prior to the 1973 attempt to organize the workers in the plant, two other organizational campaigns were conducted by the Union, one in 1968 and another in 1969. On both of those occasions consent elections were held at the Company's plant. There were no unfair labor practices charged with respect to either of the two previous elections. The Union did not file any

objection with respect to the 1969 election which was won by the Company by a vote of 54 to 20. (Ap. I, p. 27)[1]

In May of 1973, the Union requested the Company to recognize it as the exclusive bargaining representative of the employees at the plant. (Ap. II, p. 18) The Company asserted a good faith doubt that the Union represented a majority of the employees of the unit and on the same day the Union petitioned the Board for an election. (Ap. II, p. 17)

The Administrative Law Judge found that at the time the Union made its demand it did not hold a majority of the employees' authorization cards. (Ap. I, p. 16) In fact, it held only 47 employees' cards of a possible 94. (Ap. I, p. 18)

In connection with the solicitation of authorization cards, the Union represented to employees of the bargaining unit that it already had a bargaining agreement with the Company and that it would provide free insurance and additional summer vacation if the authorization cards were signed. (Ap. I, p. 42) Despite the Union's campaign and misrepresentations, the Union only held at any point in time a one card majority—that is, 48 authorization cards of a total of 94 employees in the unit. (Ap. I, p. 18)

The Company's election campaign, as in the previous elections at the plant, was very mild. The Company sent to each of the employees a letter discussing the possible consequences of inordinate Union demands and the effect upon the competition if the Union came into the plant, and the president of the Company delivered a speech to the employees on the same subject. (Ap. II, pp. 59, 60, 61-67) The Union has not objected to either the letter or the speech made by the Company. During

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[1] In the case below there were 2 Appendix volumes filed. The reference to the record below will be by citing the Appendix volume and page thereof unless otherwise specified.

the campaign there was absolutely no illegal interrogation of employees, no spying, no discharges, no threats of discharge, and no solicitation of anti-union activity. The Union, however did charge that certain statements made by one of the Company's supervisors constituted a threat in violation of Section 8(a)(1) of the National Labor Relations Act. The statement made by the Company's supervisor to the employees, like the letter and the speech mentioned above, was a prediction of the possible economic results of unionization, i.e., *that if the Union should come into the plant and by its demands increase the expenses of the Company to a point that said expenses could not be met, the Company would be required to close the plant.* (Ap. I, pp. 52, 176, 177, 204, 205) The Union also charged that a promise of benefits was given in violation of Section 8(a)(1) of the National Labor Relations Act when the Company rescheduled vacations at Christmas time to the summertime, despite the fact that there was no increase in vacation for any employee and a decrease in vacation benefits for a few of the employees. (Ap. I, pp. 180, 181) and also an alleged promise of an additional paid holiday which was testified to by only four or five of the most ardent Union supporters of the unit. At the conclusion of the election campaigns of both the Union and the Company, the ultimate vote resulted in a 50 to 42 victory for the Company—the Union losing only five votes from the time that the Union first demanded recognition as the bargaining representative for the unit. (Ap. I, p. 4)

The Union filed charges with the National Labor Relations Board with respect to the campaign practices of the Company. Upon hearing the matter, the Administrative Law Judge found that there was no illegal interrogation of employees, no spying, no discharges, no threats of discharge, and no solicitation of anti-union activity (Ap. I, p. 4), but upon minimal evidence held that the Company had violated Section 8(a)(1) with respect to the statements of the Company's supervisor and with respect to the alleged promise of benefits. The decision of the Administra-

tive Law Judge and his recommendation that an order to bargain be issued against the Company was adopted *en toto* by the National Labor Relations Board. (Ap. I, pp. 2, 3) The Union petitioned the United States Court of Appeals for the District of Columbia for review of the decision of the National Labor Relations Board and in conjunction therewith, the Board applied for enforcement of its order. These two proceedings were consolidated, and the decision of the United States Court of Appeals for the District of Columbia with respect to these matters is sought to be reviewed by this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit affirming the Order to Bargain issued to Petitioner by the National Labor Relations Board, if allowed to stand, effectively destroys the long standing policy of the National Labor Relations Act and of this Court that secret elections under the Act are the preferred method for determining union representation. The Court of Appeals and the NLRB herein have dramatically departed from the principles established by this Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) and *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974), from the decisions of the other Circuits and from previous Board decisions in applying these principles. The impact of the decision sought to be reviewed, if allowed to stand, would require the Board to issue an order to bargain in almost every case where a representation election is lost by a union, regardless of how minimal the employer's alleged misconduct might have been, or regardless of the actions of the union during an election campaign. Labor lawyers all across the country are watching this case because of the significant departure from past practice and precedent which it represents. If the bargaining order herein stands, the entire labor policy of the United States based upon freedom of choice in union representation will go by the boards. The new policy will be one of arbitrary appointment by the Board of a bargaining representative for each unit of employees despite election results.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1975), this Court set forth guidelines which justify the issuance of an order to bargain in the event of wrongful employer conduct during an election campaign. This Court held that when the alleged misconduct is minimal and of little impact upon the election processes, an order to bargain was inappropriate and the traditional remedy of a new election would be proper. (*NLRB v. Gissel Packing Co., supra*, at 610.) This Court recognized that the Board could properly order the employer to bargain with the union despite the election results when the conduct of the employer was outrageous and flagrant. The NLRB and the Court of Appeals does not contend the case at bar falls in this category. In a second category of cases, this Court held in *Gissel* that a bargaining order might be issued under the following conditions:

> 1. The union has held a valid majority of the employee's authorization cards upon demanding recognition as the employees' bargaining representative. (pages 614-615)
>
> 2. The employer's misconduct is so extensive that a fair rerun election is slight and an order to bargain must issue to protect the employees' rights. (page 615)

In the present case the Board found that the Company had engaged in some conduct violative of § 8(a)(1) of the Labor Management Relations Act. Even assuming that the Board was correct in finding that the Petitioner committed an unfair labor practice (which Petitioner vigorously denies), the character and magnitude of such alleged misconduct is wholly insufficient to justify issuance of a bargaining order. The preferred remedy should be a new election in view of a lack of evidence or a specific finding that any alleged misconduct had any impact upon the election results and in view of evidence that a fair rerun election could be held. A bargaining order is particularly improper since the Union did not have a majority of the employees' authorization cards when it demanded recognition and because the Union made certain false representations in connection with the solicitation of its cards.

Employer Conduct

This is not a case of serious employer interference with the election processes. The Board and the Court below found no

employee interrogation, spying, discharges, anti-union solicitations or other punitive action against any union supporter.

The Board alleged that the employer improperly threatened to close the plant if the employees voted for the union. This Petitioner maintains that the speech used by the company supervisor was clearly proper under the principles established by the *Gissel* case.

However, even assuming it improper, the speech is so minimal that an order to bargain cannot be justified. The Company sent a letter to the employees (Ap. II, pp. 59 and 60) and the president of the company made a speech which discussed the possible burdens of unionization (Ap. II, pp. 61-67) both of which were unobjected to by the union. The Company further told the employees, through one of its supervisors, that *if* a union should come into the plant and by its demands increase the expenses of the company to a point that said expenses could not be met, the company would be required to close the plant. (Ap. I, pp. 52, 176-177, 204, 205) These statements were made in the midst of the union's representations to the employees of free insurance and increased vacations if they voted for the union, which benefits would have obviously increased the company's expenses. (Ap. I, pp. 42-43) The Petitioner has contended from the outset that the statements made by it to the employees fell squarely within the ambit of employer predictions of economic consequences of unionization permitted by this Court. See *NLRB v. Gissel Packing Co., supra,* 618.

Further, the claimed promise of benefit which the Board found to violate Section 8(a)(1) was also based on very marginal considerations and evidence. The Board claimed that the shifting of the regular vacation period from Christmas time to July to accommodate the company's needs to produce samples for the new year, although there was no increase in vacation time to any employee. (Ap. I, pp. 180-181) In addition, it was alleged

that the Company promised an additional day of vacation if the employees rejected the Union. The evidence of this alleged promise was meager and came only from the most active Union supporters. Again, even assuming that the Company's conduct was wrongful, a bargaining order is not justified.

The order to bargain herein based upon these facts is a radical departure from the principles of *Gissel* and in direct conflict with the decisions of other Circuits. The Eighth Circuit Court of Appeals, on two occasions, had before it cases very similar to the case herein. *Dawson Metal Products v. NLRB,* 450 F.2d 47 (8th Cir. 1971); *Arbie Mineral Feed Co. v. NLRB,* 438 F.2d 940 (8th Cir. 1971). In both of those cases that Court refused to enforce a bargaining order issued by the NLRB.

In the *Arbie Mineral Feed Co.* case, *supra,* the Eighth Circuit refused to enforce a bargaining order where the evidence showed that the employer's conduct was much more severe than Petitioner's herein. That case involved interrogation and threats of loss of benefits if a union came into the plant. However, the Court found that the impact of the alleged misconduct was insubstantial and therefore, did not justify an order to bargain.

Likewise, in *Dawson Metal Products, Inc. v. NLRB,* the employer conduct involved interrogation and threats to refuse to hire union activists. Again, where the conduct was much more severe than in the present case, the Eighth Circuit held a bargaining order to be unjustified due to evidence that the impact upon the election results was not great.

Also, the decision of the Court below is in conflict with *Peerless of America, Inc. v. NLRB,* 484 F.2d 1108 (7th Cir. 1973). In that case, the Board found several instances of interrogation about union sentiment, promises of benefits and working conditions, threats and anti-union solicitations. How-

ever, the Seventh Circuit refused to enforce a bargaining order. The evidence of an effect upon the election process was lacking.

Similarly, the Court's decision below conflicts with the 5th Circuit's decisions in *NLRB v. Gibson Products Co. of Washington Parish, La.*, 494 F.2d 762 (5th Cir. 1974), and the Second Circuit in *NLRB v. General Stencils, Inc.*, 472 F.2d 170 (2nd Cir. 1972), for the same reasons that the alleged misconduct was not found to have impaired the election process.

The decision and order of the Board as affirmed by the Court of Appeals herein represents a substantial departure from previous decisions of the Board. And contrary to the rule in some circuits the Board did not distinguish this case from similar cases which did not result in an order to bargain. *NLRB v. Gibson Products Co.*, supra, p. 767; *Peerless of America, Inc. v. NLRB*, supra, p. 1119.

In *Olin Conductors, etc.*, 185 N.L.R.B. No. 56 (1970), there was involved the following unfair labor practices:

1. The employer threatened employees with loss of benefits.

2. The employer made an unlawful promise of benefit.

3. The employer held captive audience meetings with employees where it solicited grievances and resolved them or promised to do so (the grievances that were satisfied were very substantial ones).

4. A supervisor told an employee that unionism was the same thing as Communism.

The Trial Examiner recommended a bargaining order. The Board held, however, that:

> "* * * it is concluded that a bargaining order is not warranted. The 8(a)(1) violations are neither so extensive in nature nor so pervasive in character as to preclude the holding of a fair rerun election. Accordingly, a new election is ordered."

The Trial Examiner had found that the employer had violated Section 8(a)(1) of the Act and that in refusing to bargain had violated Section 8(a)(5). The Trial Examiner felt that *Gissel* required a bargaining order. However, the Board gave the proper effect to *Gissel* and refused to grant the bargaining order.

It is submitted that a reading of *Olin Conductors, supra,* shows that the unfair labor practices *FAR SURPASS* the ALLEGED UNFAIR LABOR PRACTICES HERE CHARGED.

In *Schrementi Bros., Inc., etc.*, 179 N.L.R.B. No. 147 (1969), the following unfair labor practices were involved.

1. Union agents were threatened with physical assault by the president of the company. The president of the company struck two union agents and threatened to kill them.

2. The company questioned several employees about their union activities.

The Board in refusing to issue a bargaining order stated:

> "Although the Trial Examiner found that the employer had engaged in unlawful activity, he was nevertheless persuaded that the employer did not act in bad faith in refusing to recognize and bargain with the union. While we affirm his dismissal of the Section 8(a)(5) allegation, we do not rely on his good-faith rationale, in light of Gissel, 60 LC ¶ 10,150.
>
> "It is concluded that the employer's misconduct was not sufficiently flagrant to prevent the holding of a fair rerun election. The Section 8(a)(5) violations found here were neither so extensive in number nor pervasive in character to warrant a finding of unlawful refusal to bargain or require a bargaining order to remedy their unlawful effect."

Again, the reading of *Schrementi Bros., Inc., supra,* will show the conduct of the Company in that case far surpassed any alleged unlawful conduct in the present case.

In *Abitibi Corporation,* 198 N.L.R.B. No. 176 (1972), the Board stated:

> "The Court [Gissel] also stated that bargaining orders could not be issued where conduct is 'minor or less extensive' and has a minimal impact on the election. It is concluded that the present situation falls within this latter category. The employer's unlawful conduct involved only three of 78 employees. The violations consisted of the interrogation of two employees and threats of discharge of two employees, neither of which was ever carried out.
>
> "This conduct clearly warrants the direction of a new election, but does not require imposition of a bargaining order. The Section 8(a)(5) allegation is dismissed."

Contrary to the principles governing bargaining orders enunciated in *Gissel* and *Linden Lumber Company v. NLRB,* 419 U.S. 30 (1974) and the cases from the Second, Fifth, Seventh and Eighth Courts of Appeal (cited hereinabove), the Court in this case held that the bargaining order was appropriate *despite evidence that a fair rerun election is feasible* and *without any specific finding with respect to the immediate and residual impact of the employer's conduct on the election process.*

In the *Gissel* and the *Linden Lumber Company* cases this Court made it absolutely clear that a bargaining order is appropriate only when the Labor Board determines that the conduct of the employer was so extensive that the election process is impaired to the point that only a bargaining order would remedy the situation. *Linden Lumber Company v. NLRB, supra,* at page 310. The Board and the Court below, in determining that a bargaining order was appropriate, completely

ignored substantial evidence that a fair rerun election could be held at Petitioner's plant. The Court below overlooked evidence that there had been two previous consent elections at the plant involving the same Union (Ap II, pp. 70-96, Ap I, pp. 26, 27), that there had never been an unfair labor practice charge resulting from those two previous elections and that the last election in 1969 was unobjected to by the Union (Ap II pp. 70-96, Ap I, pp. 26, 27) The Court below also completely ignored the fact that at no point did the Administrative Law Judge find that any of the alleged employer misconduct caused the loss of any votes at the election. Furthermore, the Court below completely ignored the fact that during this election campaign at Petitioner's plant the Union lost at the most only 5.2 votes of a total of 94 votes in the unit. A loss of only one vote from the number of cards held by the Union at any time would have spelled defeat for the Union.

On the other hand, the Administrative Law Judge, whose opinion the Labor Board adopted, justified the appropriateness of the bargaining order by merely reciting the conclusionary standard set forth in *Gissel,* i.e., that "the possibility of erasing" [the effects of the misconduct] and "of insuring a fair election (or a fair rerun) by the use of the traditional remedies, though present, is slight and that the employee's sentiment once expressed through cards would on balance be better protected by a bargaining order . . ." (Administrative Law Judge Opinion, Ap I, p. 19). The mere quotation of the conclusion as a finding by the Board is clearly insufficient. *Atchison, Topeka and Santa Fe Railroad Company v. Wichita Board of Trade,* 412 U.S. 800 (1973); *National Labor Relations Board v. Kostel Corp.,* 420 F.2d 347 (7th Cir. 1971); *Peerless of America, Inc. v. NLRB,* 484 F.2d 1108 (7th Cir. 1973); *NLRB v. Gibson Products Co. of Washington Parish, Louisiana, Inc.,* 494 F.2d 762 (5th Cir. 1974). As the Court in the *Gibson* case above held at page 767, the mere recitation of conclusions without factual explication can frustrate this Court's teaching that the election

process is the preferred way of achieving union representation and opens the door to the Labor Board issuing in a cavalier fashion bargaining orders.

The Court's decision below is therefore in direct conflict with cases from the Seventh, Fifth and Fourth Circuits with respect to the requirement that the Board state with some specificity the reason supporting its conclusion that only a bargaining order would suffice to remedy the unfair labor practices.

Union Conduct

The bargaining order herein, also, is unjustified for the reason that authorization cards solicited by the Union were obtained through Union misrepresentations. Also, the Union did not have a majority of the cards when it demanded recognition as the sole bargaining agent for the employees in question.

The purpose of a bargaining order, when appropriate, is to protect the expression of a majority of the employees that they want union representation. The expression of the employees is made by authorization cards. Therefore, if the cards were improperly obtained through misrepresentations or other improper means, a bargaining order is not justified. *NLRB v. Gissel Packing Co., supra,* at 592. Also see *NLRB v. Savair Manufacturing Company*, 414 U.S. 270 (1973) and *NLRB v. Tower Co.*, 329 U.S. 324 (1946).

The record herein is clear that the Union did make substantial and material misrepresentations to the employees in soliciting authorization cards. The Union had printed on each authorization card solicited prior to the election that the employer and the Union already had in effect a collective bargaining agreement. The statement read as follows:

> "I hereby authorize my Employer (the Company named on the reverse of this card) to deduct from my wages dues

> and initiation fees that may be due to the Union (the Union named on the reverse of this card). The authority to make such deduction shall be irrevocable for the period of one year [sic; the word 'or' appears to have been omitted] until the termination date of *the collective bargaining agreement between my Employer and the Union*, whichever occurs sooner, and I agree, and direct that this authorization shall be automatically renewed and shall be irrevocable for successive periods of one year and for the period of *each succeeding collective bargaining agreement between my Employer and the Union*, whichever shall be shorter, unless written notice is given by me to my Employer and the Union not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of each collective bargaining agreement between my Employer and the Union, whichever occurs sooner. If a new worker: this authorization becomes effective at the end of my trial period." (Appendix II, p. 20) (Emphasis added)

Moreover, there was evidence indicating that some of the signatures on authorization cards were obtained by misrepresentations as to insurance and vacations (Ap. I, pp. 42, 43).

In addition to the dubious validity of the authorization cards due to the Union misrepresentations, the Union did not have a majority of the authorization cards at the time it demanded recognition as the exclusive bargaining representative of the employees (Ap. I, p. 42). Whether the Union ever had a valid majority is therefore very questionable.

Without a definite and valid expression of a majority of the employees through authorization cards designating the Union as the bargaining representative, an order to bargain is improper. In this case there is great doubt that the Union ever held a valid majority. Any claimed majority, if valid, was by only one vote

—48 cards of a 94 employee unit (Ap. I, p. 18). This certainly is not a case where the equities of the situation require an extraordinary remedy in the form of a bargaining order. A new election would adequately protect and fairly guarantee the rights of all parties concerned.

CONCLUSION

In summary, the bargaining order of the Board issued to Petitioner represents a drastic departure from principles governing similar cases as established by this Court. It represents a significant conflict with the decisions of other Circuit Courts of Appeals and previous Board cases. The conduct of Petitioner herein had little or no impact upon the outcome of the election. The bargaining order was issued despite evidence that a fair rerun election is feasible. Moreover, the bargaining order herein is improper due to the misrepresentations of the Union made in connection with the solicitation of authorization cards and due to the fact that the Union never held a valid majority of the employees' authorization cards.

For all of the foregoing reasons, Petitioner prays that this Writ of Certiorari be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
For the District of Columbia Circuit

No. 74-1608

Amalgamated Clothing Workers of America,
AFL-CIO, Petitioner

v.

National Labor Relations Board, Respondent
Jimmy-Richard Co., Inc., Intervenor

No. 74-1668
National Labor Relations Board, Petitioner

v.

Jimmy-Richard Company, Inc., Respondent
Amalgamated Clothing Workers of America,
Intervenor

Petition for Review and Application for
Enforcement of an Order of the
National Labor Relations Board

Argued September 9, 1975

Decided December 8, 1975

Ann Neydon, for petitioner in No. 74-1608 and intervenor in No. 74-1668. *Arthur M. Goldberg* and *George Kaufman*, were on the brief for petitioner in No. 74-1608 and intervenor in No. 74-1668.

John F. Depenbrock, Attorney, National Labor Relations Board with whom *John S. Irving*, Deputy General Counsel, *Patrick Hardin*, Associate General Counsel, and *Elliott Moore*, Deputy Associate General Counsel, National Labor Relations Board, were on the brief for respondent in No. 74-1608 and petitioner in No. 74-1668.

Howard Kent Munson for respondent in No. 74-1668 and intervenor in No. 74-1608. *Charles Alan Seigel*, was on the brief for respondent in No. 74-1668. *Edward Greensfelder, Jr.*, also entered an appearance for intervenor No. 74-1608 and respondent 74-1668.

Before: Tamm, Robinson and MacKinnon, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* Tamm.

Opinion filed by *Circuit Judge* MacKinnon, concurring in part and dissenting in part.

Tamm, *Circuit Judge*: This case concerns the enforceability of a bargaining order issued by the National Labor Relations Board against an employer for pre-election unfair labor practices following his refusal to bargain with a union claiming majority status by virtue of authorization cards. This challenge to a NLRB bargaining order is a familiar one despite the Supreme Court's enforcement of a similar order in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We find the facts of this case squarely within the parameters established in *Gissel* and affirm both the finding of unfair labor practices and the bargaining order.

Jimmy Richard Co., Inc. is a Georgia manufacturer of men's and boys' clothing. In April of 1973, Amalgamated Clothing Workers of America, AFL-CIO made a written demand for recognition based on authorization cards signed by a majority of the employees. The demand was refused four days later in a letter claiming the company's good faith doubt as to the union's majority status. The union then filed an election petition with the NLRB which was approved on May 9. After the union lost the June 1 election by a vote of 50 to 42, it filed objections alleging that during the two-week period preceding the election the employer had promised a change in vacation scheduling and an additional paid holiday if the union lost the election, had threatened plant closing or moving, and had interrogated employees and solicited withdrawal of the union authorizations.[1] After a hearing the Administrative Law Judge (ALJ) concluded that the employer's threat to close the plant if the union made unreasonable demands, his manner of notifying selected employees about proposed vacation changes, and his unilateral adoption of the vacation changes following the election violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1970); the ALJ found no merit, however, in the claims of solicitation and interrogation. He further held that the pre-election 8 (a)(1) violations, combined with the refusal to accept the union's continuing demand for recognition, constituted a violation of the section 8(a)(5) duty to bargain. Noting the highly coercive nature of threats of plant closing and the very

[1] The complaint also accused the employer of granting economic benefits to employees who were known to be antiunion. The preliminary investigation determined that some of the challenged benefits had been conferred in accord with routine business procedures. The ALJ was therefore not concerned with those allegations at the hearing. II J.A. at 12-13. No findings of fact appear in the ALJ's opinion as to whether the employer had granted an impermissible economic benefit by re-instating health insurance for the spouse of one employee. *Compare* ALJ Opinion, I J.A. at 4-24, *to* Report on Objections, II J.A. at 12-14, 16.

slight possibility of a fair rerun election, the ALJ recommended that the NLRB issue both a cease and desist order and a bargaining order. The NLRB affirmed and issued the recommended orders. Pursuant to section 10(f) of the National Labor Relations Act, the union has appealed the ALJ's finding that the employer had not solicited withdrawal of the authorizations; the NLRB has sought enforcement of its order under section 10(e).[2] In this consolidated appeal, the employer has challenged both the unfair labor practices findings and the issuance of the bargaining order.

We affirm the NLRB's adoption of the ALJ's findings as to 8(a)(1) and 8(a)(5) violations in all respects. The record clearly provides substantial evidence to support the finding that the employer, acting through the plant supervisor, informed selected employees that the vacation changes were "good news"—by inference, a benefit to be enjoyed along with an additional holiday if the union lost the election. I J.A. at 12-15. The record also supports the ALJ's factual determination that the employer assisted employees' revocation of union authorization only upon request of the employees and, therefore, did not engage in impermissible solicitation or interrogation. *Id.* at 5-8. These were issues of credibility and, as such, were properly left to the ALJ. We also agree that the speeches and individual conversations threatening possible plant closing or moving were not within the narrow sphere of protected employer speech

[2] 29 U.S.C. § 160(e), (f) (1970) provides in relevant part:

(e) The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals. . . . [T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

delineated in *Gissel*. Recognizing "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear," 395 U.S. at 617, the court required that any predictions be capable of objective proof of consequences beyond the employer's control. *Id.* at 618. We find in this case, as the Court did in *Gissel*, that "the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities." *Id.* at 619.

Having determined that affirmance of the 8(a)(1) and 8(a)(5) violations is required, we need only resolve whether the Board's bargaining order is consistent with both its policy favoring certification elections and the bargaining order guidelines established in *NLRB v. Gissel Packing Co., supra*. We believe that it is.

In *Gissel*, the Supreme Court upheld a bargaining order issued against General Steel Products, Inc.[3] The employer had objected to the validity of the cards, but that issue was resolved against him by the trial examiner. Meanwhile the employer had committed unfair labor practices in the pre-election period. In affirming the bargaining order, the Court noted that even "in less extraordinary cases marked by less pervasive practices," the Board's expertise entrusted it, and not the courts, with the responsibility for selecting the appropriate remedy. *Id.* at 612 n.32. The Court enunciated three

[3] Three cases had been consolidated in the appeal—*Gissel Packing Co., Heck's Inc.*, and *General Steel Products, Inc.* In addition, a separate appeal of *Sinclair Company* was disposed of by the Court in the *Gissel* opinion. The facts of *General Steel* are closest to those at issue in this case.

prerequisites for issuance of a bargaining order where the unfair labor practices are not "outrageous" or "pervasive": (1) the union at one point had a majority; (2) the employer has committed unfair labor practices; and (3) the possibility of ensuring a fair election by traditional remedies is slight and thus better protected by a bargaining order.[4] The extensiveness of past employer practices, while not necessarily determinative, is a consideration for the Board in balancing the preference for the election procedure with the need to assure a fair election. *Id.* at 614.

In this case, the ALJ found that prior to employee revocation the union had obtained 59 authorizations out of 94 employees. I J.A. at 16. Although 12 of these authorizations were revoked before the April 16 demand for recognition, leaving 47 out of 94, the findings reveal that before the consent election was approved, the union had again obtained a majority, including one card signed on April 14.[5] *Id.* at 17-18.

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[4] The Supreme Court held in Linden Lumber Co. v. NLRB, 419 U.S. 301, 310 (1974), that mere refusal to accept a majority showing is not of itself an unfair labor practice. Sustaining Board policy, the Court ruled that the burden to ask for an election is on the union rather than the employer. The decision, however, clearly indicates that *Gissel* still controls where "an employer has engaged in an unfair labor practice that impairs the electoral process" in addition to refusing to accept the showing of majority status. As one commentator has observed about the *Linden Lumber* decision,

> the Court clarified the *Gissel* decision, which held that the key to the issuance of a bargaining order is *whether the employer has committed an unfair labor practice that interferes with the election process*, not whether the union has evidenced majority support.

Linden Lumber Division v. NLRB: *Requisites for Issuance of a Bargaining Order—A Logical Extension of the* Gissel *Doctrine*, 2 Ohio Northern L. Rev. 774, 775 (1975).

[5] It is unclear from the ALJ's opinion why this April 14 authorization was not sufficient to give the union a majority as of the demand date. Nor is his computation of 48, rather than 52, authorizations as of May 8 clear. I J.A. at 16-19. Despite these facial mathematical inconsistencies, however, the continuing demand the-

The employer's unfair labor practices—coercive threats, promises of benefits, and unilateral changes in employment conditions—occurred after the consent election was approved on May 9 and after the union had obtained majority status. These practices reasonably account for the union's losing the election by the narrow vote of 50 to 42. *See generally NLRB v. Dixisteel Buildings, Inc.*, 445 F.2d 1260 (8th Cir. 1971). The company argues that the close vote indicates that its unfair labor practices were minor and not sufficient to entitle the union to a bargaining order. It seems more logical to conclude, however, that the union's slight majority could have been eroded, and was in fact destroyed, by the employer's threats of closing or moving the plant. Similarly, the promise of an additional holiday made to a small number of employees could have affected some of the six critical votes. The effect of such less pervasive violations on bare majority situations has been acknowledged in *NLRB v. Okla-Inn*, 488 F.2d 498, 508 (10th Cir. 1973), *rehearing denied* (1974) (enforcing bargaining order).

The ALJ stated that a threat of plant closing is one of the most serious obstacles to fair elections and found that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." I J.A. at 20, *quoting Gissel, supra*. This finding is sufficient to support a bargaining order, as discussed in the *Gissel* case. It should be noted again that *Gissel* does not require a finding that no other remedy could suffice, only that the bargaining order better protects employees' expressed union preference.

In *Gissel* the Court was so reluctant to ignore the Board's expertise in remedying unfair labor practices that it remanded

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ory applied by the ALJ provides a solid basis for imposing the bargaining order. *Cf.* NLRB v. Mink-Dayton, Inc., 416 F.2d 327 (6th Cir. 1969), *cert. denied*, 400 U.S. 829, *enforced after remand*, 426 F.2d 255 (1970).

the case to the Board to make the requisite findings that possibly were "implicit in the Board's decisions below to issue bargaining orders." 395 U.S. at 616. As the Court stated emphatically, "[W]e think it clearly inappropriate for the court below to make any contrary findings on its own." *Id.* In this case, the ALJ has made the requisite findings and the Board has approved the findings and the order. It is not for this court to second-guess the Board or to reject its supported findings.

We are well aware of the post-*Gissel* line of cases requiring the Board to make detailed findings to support its conclusion that a bargaining order is the proper method to remedy 8(a)(5) violations. Even in these cases, however, there is support for enforcement where the employer has threatened plant closing and has promised additional benefits. *See, e.g., NLRB v. Kaiser Agricultural Chemicals,* 473 F.2d 374 (5th Cir. 1973); *NLRB v. WKRG-TV, Inc.,* 470 F.2d 1302 (5th Cir. 1973).

Even more convincing is the fact that in *Gissel* the Court approved the bargaining order entered against Sinclair without a showing of a prior union majority because the facts indicated "exceptional" or "outrageous" unfair labor practices. 395 U.S. at 615. As one commentator has noted, "[S]ome guidance may be had from the fact that the Court found that *Sinclair* belonged to the 'aggravated,' or first, category, *even though the independent unfair labor practices were limited to 8(a)(1) threats.*" Platt, *The Supreme Court Looks at Bargaining Orders Based on Authorization Cards,* 4 Ga. L. Rev. 779, 794 (1970) (emphasis added). If such threats are within the "exceptional" category, they must also qualify as "less pervasive violations" that can be remedied by a bargaining order.

One additional argument deserves comment. The employer states that the history of two prior elections should defeat the

ALJ's finding that the 8(a)(1) and 8(a)(5) violations were so pervasive as to require issuance of the bargaining order. The company states that "in 1968 and 1969 there were two elections, neither of which resulted in a single unfair labor practice charge." Jimmy-Richard Co. Br. at 31. The ALJ's report notes, however, that the 1968 election did elicit objections by the union and was set aside by agreement of the parties. I J.A. at 5. *See also* II J.A. at 70-96. Although this agreement does not, of course, indicate that an unfair labor practice occurred, neither is it strong support for the company's suggestion of an irrefutable history of fair elections. It is true that the company's 1969 election victory did not result in objections by the union and is entitled to consideration by the Board. The ALJ's recognition of the unchallenged election, however, does not mandate that he ignore the present unfair labor practices and the coercive effect of threats of plant closing. After examining the bargaining history, the types of violations, and the election atmosphere, he found that a bargaining order was the proper remedy. We affirm that order consistent with the agency deference expressed in *Gissel.*

So ordered.

MacKinnon, *Circuit Judge,* concurring in part and dissenting in part. While the Board's findings may be found to be supportive of its conclusions as to unfair labor practices, they are wholly insufficient in character and magnitude to justify issuance of a bargaining order in place of the more highly preferred order for another representation election.

> In terms of getting on with problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored.

Linden Lumber Division v. NLRB, 419 U.S. 301, 307 (1974). I would thus affirm the Board's findings in all respects except that I would remand the case to the Board to issue an order directing another election.

The Board properly decided to dismiss allegations that the Company violated section 8(a)(1) of the National Labor Relations Act by engaging in coercive interrogation and solicitation of employee withdrawals from the Union. The Board, however, contends that there is substantial evidence in the record as a whole to support its findings that the Company violated section 8(a)(1) of the Act by threatening to close the plant if the employees voted for the Union and by promising them benefits if the unit voted against having union representation.

The Union first advised the Company on April 12 that it claimed to represent a majority of its employees, to which the Company responded on April 16th that it had a good faith doubt of the Union's claim. The facts related to the invalidity of certain of the signature cards indicate that this doubt was fully justified. The Union thereupon filed an election petition with the Board, and on May 9, with the Board's approval, the Company and the Union executed a Stipulation for Certification Upon Consent Election, which provided for a secret-ballot election to be conducted by the Board. In the ensuing period before the July 1st election the Company sent a letter to its employees, and its president addressed them in a speech to which there was no objection as to content, then or now. The speech discussed the possible burdens of unionization in terms similar to those which the Board now finds objectionable. Thereafter the Company engaged in a number of electioneering practices that were unobjected to and some of those that were objected to by the Union the Board found to have been properly conducted. No employee ever was discharged for union activity and there was no evidence of spying or interrogation. Two prior consent elections had been held at the Company plant with the same union in 1968 and 1969 without any unfair labor practices.

The evidence that the Company improperly threatened to close the plant if the employees voted for the union is minimal

at best. What the Company did say, through one of its supervisors, was that, if a union should come into the plant and by its demands increase the expenses of the Company to a point that they could not be met, the Company would be required to close the plant. This statement was made in an environment in which the Union, without any basis therefor, was representing to employees, in the solicitation of signatures to union authorization cards, that by voting to have union representation the employees would get "free insurance" and "two weeks vacation in the summer." The additional costs of such programs would obviously involve a substantial increase in the operating costs of the Company. Therefore, it was justified in assuming that unionization of its employees would increase its financial burdens. The extent of this burden was unknown because the union had not articulated the extent of the "free insurance" it would require, but the Company was fairly entitled to refer to the possible effect of this added cost if it became too high.

The claimed promise of benefits by the Company, which the Board found to support a section 8(a)(1) violation, was also based on very marginal considerations and evidence. The alleged benefits consisted of shifting a regular vacation period from Christmastime to July to better accommodate the needs of the Company to produce year-end garment samples. No increase in total vacation time was involved. In addition, it was charged that the Company promised it would give one additional paid vacation on Memorial Day if the unit voted against the Union. However, the testimony to this latter oral representation was meager and came only from five employees who were the most active in union activity.

Under such circumstances, the record is insufficient to justify the further action of the Board in issuing a bargaining order in lieu of calling for another representation election. Recently the Supreme Court in *Linden Lumber Division v. NLRB*, supra, held that where the unfair labor practices do not impair the

electoral process, a violation of section 8(a)(5)[1] is not committed simply by an employer's refusal to accept union authorization cards, allegedly signed by employees in the bargaining unit, as evidence of the Union's majority status. Here, the Board has found on the basis of 48 signed cards out of a 94-employee unit, that the Company failed in its obligation to bargain with a union representing a majority of the employees. The loss of one card would destroy the union majority, and there is testimony indicating that some of the signatures to a number of the union authorization cards were obtained by the misrepresentations as to insurance and vacations which the Board countenanced as "propaganda." In my opinion, these misrepresentations were particularly egregious because they were completely speculative.

In addition, the back of the authorization cards, which were signed by all of the employees whose signatures were obtained, could represent to a reasonable person that a "collective bargaining agreement between [the] Employer and the Union" was *already in effect*, when such was not the case. See statement on the back of the cards, which in its entirety read as follows:

> I hereby authorize my Employer (the Company named on the reverse of this card) to deduct from my wages dues and initiation fees that may be due to the Union (the Union named on the reverse of this card). This authority to make such deduction shall be irrevocable for the period of one year [*sic*: the word "or" appears to have been omitted] until the termination date *of the collective bargaining agreement between my Employer and the Union*, whichever occurs

[1] 29 U.S.C. § 158(a) (5) which provides:

> (a) It shall be an unfair labor practice for an employer—
>
> * * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

> sooner, and I agree, and direct that this authorization shall be automatically renewed and shall be irrevocable for successive periods of one year and for the period of *each succeeding collective bargaining agreement between my Employer and the Union*, whichever shall be shorter, unless written notice is given by me to my Employer and the Union not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of each collective bargaining agreement between my Employer and the Union, whichever occurs sooner. If a new worker: this authorization becomes effective at the end of my trial period.

App. II 20 (emphasis added). The Union must admit that the foregoing statement was relied upon by *every* signing employee because the cards constituted the authorization for the check-off of union dues from the employees' salaries. The Board is thus on very questionable grounds in finding that all the signature cards were validly obtained. The majority opinion does not even discuss this basic and pervasive misrepresentation. Meanwhile it opines "that the union's slight majority could have been eroded, *and was in fact destroyed*, [emphasis added] by the employer's threats of closing or moving the plant," and relies on this to support its approval of the issuance of the bargaining order. The italicized portion is unsupported by the record. At no point did the ALJ find that any threats were the cause of the putative lost majority—it could just as well have been attributable to the not infrequent impermanence of card majorities. Moreover, the opinion does not recognize or consider to any extent the fact, which must be recognized in this record, that the union majority of card authorizations, and its 42 votes in the election, might have been largely the result of *union* misrepresentations and promises of uncertain benefits. It is grossly unfair to consider the conduct of an employer on an election result without giving equal consideration to the union conduct in the same election.

Furthermore, with justification the employer questioned the validity of the signature on a few of the authorization cards. When all these circumstances are considered in light of the fact that the Union never claimed more than 48 signed employee authorization cards in the 94-employee unit, the Board's finding of a union majority appears paper-thin, if not highly questionable. The Board, however, has wide discretion in these matters which must be recognized, and I accede to the exercise of that discretion, but I would not stretch such findings on the unfair labor practices into justification for the Board to issue a bargaining order, because the Board's factual findings do not indicate any substantial impairment of the election process.

NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) recognizes that

> an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." *He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control* or to convey a management decision already arrived at to close the plant in case of unionization. *See Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965).

(Emphasis added). Thus, employers are entitled to make certain justifiable economic predictions. Further, bargaining orders are to be issued only on supportable findings.

At a minimum, the reasons expressed by the Board for bargaining order findings must be both internally consistent and logical on their face and sufficiently specific to permit appellate

courts to relate the facts of the case to the findings. The reasons supporting the bargaining order of the ALJ, and thereby of the Board, fail dismally on both counts. The ALJ's decision regarding the bargaining order is bottomed on his finding that the employer threatened the employees in violation of section 8(a)(1). (App. I 20). At App. I 11-12, the ALJ presents three reasons for his finding on the threats. The first reason is strictly conclusory, with no specificity whatsoever. The reasoning consists of a recitation of disclosures as to financial condition and as to potential bargaining posture not made by the employer. The passage does not even mention (1) why the employer must divulge such information before bargaining starts, or (2) why the burden of proof in this instance shifts to and remains with the employer, nor does the passage mention such matters as, (3) the economic effect on the employer of such union claims as "free insurance", which insurance would obviously affect the employer's financial condition, (4) why the Union should not proffer evidence on the economic impact on the employer of "free insurance" and other benefits advertised by the Union, (5) the factors which in the ALJ's view made unavailing the anonymity of secret ballot voting to protect the true expression of choice by the employees, and (6) why the purely contingent statements of the employer, in the face of then abiding national economic conditions, do not bring the employer's statement within the broad protection of the first amendment, as required by the *Gissel* acknowledgement of predictions "phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences." In fact the ALJ does not acknowledge that the company, as well as the Union, has first amendment interests at stake, nor does he appear seriously to credit the fact that an increase in economic burdens can destroy a company's competitive edge and force it to close facilities.

The second reason is not addressed to *Gissel*-permitted predictions by employers, and so is not here apposite. It is addressed to the *Gissel* exemption for a management decision already arrived at to close the plant.

This third reason is inconsistent and illogical on its face: the ALJ writes that the employer (Respondent) was inconsistent in "telling employees . . . that the Union *will make* 'unreasonable' demands on Respondent which it cannot afford . . ." (emphasis added), yet, two pages before, the ALJ *expressly found* that the objectionable statements (referring to the employer representative who spoke) were conditional, *i.e.*, that

> the plant would close *if* the Union won the election *and* made "unreasonable demands," in [other cases] that it would *if* it demanded "too much money" and in other cases he added language about the company's ability to "afford" or "meet" the Union's demands. [Emphasis added].

This is the total extent of the ALJ's findings on the objectionable statements. The ALJ thus jumped from imputing to the employer the correctly contingent wording of what might happen *if* the Union made certain demands to imputing the emphatic and certain phrasing that the Union "will make" such demands. Worse, in his third reason, the ALJ also argues that if the employer believed that its present employee benefit program matched those of its competitors, then the employer had no reason to fear Union demands. This argument displays an ignorance of ordinary union activity: it ignores the probability that the Union would work to increase the existing benefits at the plant, whatever the level of benefits existing at the time of unionization. It is unlikely that a union would come in and accept status quo. The ALJ's third reason thus unravels.

The result is that the Board and the majority in this case put employers in an untenable position, in flagrant disregard of the principles of *Gissel*. With regard to employer predictions, the heart of *Gissel* is specificity and objectivity, both as to employer's statements and as to Board analyses supporting bargaining orders. Here, the employer was as specific and objective as possible, given the Union's intonations about vacations and insurance. The Board, on the other hand, here exacts of itself a

very low standard of specificity and factual rigor in weighing the bargaining order question—a standard so low that the Board's bargaining order decision in this case is arbitrary and capricious.

Under the factual circumstances, it is my view that the Board exceeded its authority in issuing a bargaining order because the facts which supported the unfair labor practices were not of such character and magnitude as to be "likely to destroy the Union's majority and seriously impede the election." *NLRB v. Gissel Packing Co., supra*, 395 U.S. at 600, cited in *Linden Lumber Division v. NLRB, supra*, 419 U.S. at 303-04. To this extent I respectfully dissent.

APPENDIX B

United States of America
Before the National Labor Relations Board

Jimmy-Richard Co., Inc., and Amalgamated Clothing Workers of America, AFL-CIO.	Cases 10-CA-10376 10-RC-9582.

DECISION AND ORDER

On February 11, 1974, Administrative Law Judge George J. Bott issued the attached Decision in this proceeding. Thereafter, the Respondent and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law

Judge and hereby orders that the Respondent, Jimmy-Richard Co. Inc., Hawkinsville, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

It Is Further Ordered that the petition in Case 10-RC-9582 be, and it hereby is, dismissed.

Dated, Washington, D.C. May 22, 1974.

	JOHN H. FANNING,	Member
	HOWARD JENKINS, JR.,	Member
	JOHN A. PENELLO,	Member
(Seal)	NATIONAL LABOR RELATIONS BOARD	

United States of America
Before the National Labor Relations Board
Division of Judges
Washington, D. C.

Jimmy-Richard Co., Inc., and Amalgamated Clothing Workers of America, AFL-CIO.	Cases 10-CA-10376 10-RC-9582.

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DECISION

Statement of the Case

George J. Bott, Administrative Law Judge: The hearing in these consolidated cases was held before me in Hawkinsville, Georgia, on December 4, 5 and 6, 1973. Case No. 10-RC-9582 began with a Petition for Certification of Representatives filed by Amalgamated Clothing Workers of America, AFL-CIO, herein Union or Petitioner, on April 16, 1973. Pursuant to a Stipulation for Certification Upon Consent Election executed

by the parties and approved by the Regional Director for Region 10 of the National Labor Relations Board on May 9, 1973, an election by secret ballot was conducted on June 1, 1973. The Union lost the election by a vote of 50 to 42, and, on June 8, 1973, filed objections to the election. The Regional Director investigated the objections and issued a Report on Objections in which he concluded that substantial and material issues of fact had been raised which could best be resolved by a hearing. On September 17, 1973, the Board adopted the Regional Director's recommendations as contained in his report.

The unfair labor practice case began with a charge filed by the Union on September 11, 1973, against Jimmy-Richard Co., Inc., herein Respondent or Employer, on which the Regional Director issued a complaint on November 14, 1973, alleging that Respondent had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act. Since some of the issues raised by the objections parallel those raised by the allegations of the complaint, the Regional Director consolidated the cases for hearing.

All parties were represented at the hearing. Subsequent to the hearing, General Counsel and Respondent filed briefs which have been carefully considered.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. **Respondent's Business.**

Respondent is a Georgia corporation with a place of business located in Hawkinsville, Georgia, where it is engaged in the manufacture of men's and boys' garments. During the calendar year preceding the issuance of the complaint, Respondent sold

and shipped from its Hawkinsville plant finished products valued in excess of $50,000 directly to customers located outside the State of Georgia.

Respondent is an employer engaged in commerce within the meaning of the Act.

II. **The Labor Organization Involved.**

The Union is a labor organization within the meaning of the Act.

III. **The Alleged Unfair Labor Practices.**

A. **Independent violation of Section 8(a)(1) of the Act**

1. **Solicitation of withdrawals from the Union.**

The Union has made two prior attempts to organize Respondent's employees. An election held in 1968 was set aside by agreement of the parties after the Union filed objections to its conduct. The Union also lost the 1969 election, but it filed no objections. In late 1972 and early 1973, the Union again solicited and obtained employee signatures to cards designating the Union as the signer's bargaining representative, and the complaint alleges that Respondent, "on or about May 15, 1973," in violation of the Act, "solicited individual employees to sign letters withdrawing their support of the Union."

At the hearing, at the request of Respondent's counsel, General Counsel produced 12 letters signed by employees of Respondent stating that the signer had signed a union card and wanted it returned. The language of the letters is identical. The letters had been received by the Union and had been turned over to the Board during the investigation of these cases.

Durwood Dominy, Respondent's plant manager, testified that the letters had been typed by a secretary in Respondent's office, but he also stated that in each case the employee came to him of her own accord, or sent word to him through another employee, and told him that she had signed a union card, but had changed her mind, wanted to get out of the Union and needed advice on how to do it. Dominy testified that he advised each employee that he had a form which the employee could sign and deliver to the person who had obtained the employee's signature to a union card. He said that the employees asked that he have the letters prepared, and he did. He denied asking any employee in these cases whether they had signed union cards. He had no recollection of having copies made of the letters, but he said he had searched for copies and found none in the company's files.

Employee Austin signed a union card on April 6, 1973. She testified that she became "nervous" after she signed the card and wanted to get it back. Having heard other employees talking about a letter which they had signed, she spoke to Dominy and asked him about the letter. She also testified that Dominy asked her if she had signed a union card and agreed to send a letter for her signature when she said she had. He never did.

Austin was somewhat confused in her testimony. She indicated at one point that Dominy raised the subject of signing a letter to the Union when he appeared at her station but at another she said she did. It is clear from the whole of her testimony that she solicited Dominy's assistance. I also find that Dominy did not ask her if she had signed a union card, and in any case, if he did, it would have been a natural and innocent reaction to her inquiry about signing a letter to the Union.

Employee Snell signed a union card on February 6, 1973. She testified that Dominy, without being invited by her, twice

came to her machine and asked her if she wanted to sign a paper withdrawing from the Union. She also said that he asked her if she had signed a union card before he presented her with a form letter to the Union, and she added that she kept the letter without signing it and did not show it to anyone. There is nothing in the affidavit Snell gave an investigator for the Board about Dominy asking her to sign a letter. I credit Dominy's testimony that he approached employees only if they had indicated to him directly or through another employee that they wanted to have their union cards returned to them. I find further that if Dominy did talk with Snell in this regard it was in the circumstances he described.[1]

Whether an employer violates Section 8(a)(1) of the Act by involving itself in employee revocations of their union authorizations depends upon the extent of the employer's participation in the process. Where, as here, employees initiate the requests to withdraw and the employer returns the letters to the employees, so that they can deliver them to the Union, and does not keep copies for its files, the fact that the resignations were prepared or typed by the employer does not make its actions illegal. I find that Respondent did not interfere with, restrain

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[1] Some corroboration of Dominy's testimony about the way he operated in this area is found in the testimony of some of General Counsel's witnesses. Gail Lemmon testified that she signed a letter withdrawing her union card after she asked an employee to tell Dominy that she wanted to see him. She asked Dominy to "explain the union" to her when he appeared, she said, and when he asked her if she wanted to get out of it, she replied that she did because she did not understand it. Juanita Dellemar testified that an employee told her that if she did not want the Union she could sign a paper and get her card back. Someone told Dominy that she wanted to talk with him, and when he came to her machine she told him that she did not "understand the union." She said she asked him if he could not "give (me) some papers to sign" in order to get her union card back. Dominy replied that he could, if she desired it. She said she did, and he brought her the letter and left it with her. .Lois Taylor identified her letter of withdrawal, but in no way indicated that Dominy had solicited it.

or coerce employees in the exercise of their rights under the Act by Dominy's actions in connection with the withdrawal requests.[2]

2. **Interrogation**

The complaint alleges that Respondent, by Plant Manager Dominy, illegally interrogated employees about their union membership and activities, but the only evidence in the record to support his allegation is found in the testimony of employees who testified about Dominy's help in preparing their union withdrawal letters. I have credited Dominy's testimony that he asked no employee whether she had signed a union card when he talked with her about getting her card back from the Union, and I have also indicated earlier that, even if he did, it had to be in response to the employee's request for assistance in having the card returned to her. In such circumstances, the inquiry, if made, could not have interfered with the employee's Section 7 rights. I find that Respondent did not violate the Act in this respect, as alleged.

3. **Threats of reprisal**

The complaint alleges that on various dates in May 1973, Respondent, by Dominy, threatened employees that "if the Union were designated as the employees' collective bargaining representative and requested too much money, Respondent would close the plant." The questions here are whether these statements were made and, if so, whether they constituted a violation of the Act.

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[2] *Continental Nut Co.*, 195 NLRB 158; *Kay Electronics, Inc.*, 167 NLRB 1104; Cf. *Hatteras Yachts, AMF Incorporated*, 207 NLRB No. 156, pp. 10-11, slip opinion; *Jai Lai Cafe, Inc.*, 198 NLRB No. 108, p. 6, slip opinion; *Cumberland Shoe Company*, 160 NLRB 1256, 1259.

Fifteen employees testified that during a period of approximately 2 weeks prior to the June 1 election, Dominy made statements to them about Respondent closing down and leaving Hawkinsville if the Union won the election. Dominy conceded that he spoke with approximately 60 employees before the election and told them that Respondent would close the plant under certain conditions, but there is a dispute about the precise words he used in describing those conditions to the employees.

Some of the employee witnesses testified that Dominy told them that the plant would close if the Union won the election and "demanded too much." For example, Elizabeth Brown testified that Dominy told her almost exactly that, and she said she told Dominy that she did not think that the Union would demand "too much." She denied that Dominy had included the words "could not afford" in his remarks about the Union's demands. Employees Williams, Asbury, Austin and Yansom testified to the same effect as Brown. Respondent would close and move back to St. Louis if the Union won the election and "demanded too much money," and they denied that Dominy had included the signing of a union contract that Respondent could not afford as a factor in Respondent's conditional plans to move.

Most of the employees who testified, however, agreed that Dominy stated that the plant would be closed if Respondent could not "meet" or "afford" the Union's damands. Anderson, for example, said he told her that if the Union won and made "unnecessary" demands which the company "couldn't meet," then it would close down. Employees Bray, Lemmon, Lindsey, Owens, Twiggs and Carter also remembered Dominy describing the Union's demands that would cause a plant closing as demands that Respondent could not "meet" or "afford." None of the employees recalled Dominy saying anything about Respondent being forced to sign a contract when he spoke to them

about what Respondent would do if the Union made demands which Respondent could not "afford."[3]

Dominy testified that in talking to employees before the election he took pains to use the same language with each person. He said he told them that "if the Union were voted in and we were forced to sign a contract that we could not meet, caused us to have excessive costs, that we would have to close down." He said he had discussed this subject with Respondent's president, Lieberman, and with counsel before he spoke with employees, and that he decided to use the words "forced to sign a contract" as one of the conditions which would cause Respondent to close its plant because counsel had advised that this was a legally permissible choice of expressions.[4]

I do not credit Dominy's testimony that he carefully used the same language in talking to each of the 60 employees he spoke with and included in his remarks the words "forced to sign a contract." First of all, I was impressed by the testimony of those employee witnesses who denied on cross-examination that Dominy had mentioned signing a contract when he talked

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[3] In answer to a proper but leading question on cross-examination, Leila Owens answered "yes" to the proposition that Dominy said if the company "had to enter a contract in which there were expenses that they could not afford that they'd have to leave and you might lose your machine." On redirect she repeated her earlier testimony, and she added that she did not recall Dominy saying anything about a contract. I recall the witness well, and I find that she was confused when she replied to Respondent's counsel's question and that she actually had no recollection of "contract" being mentioned by Dominy.

[4] Lieberman did not testify. In a speech he gave to employees before the election he stated that "If the Union should come into our plant, and force upon us expenses which we cannot afford and that will destroy our ability to be competitive, we obviously will have no choice but to go out of business and leave Hawkinsville." At another point in the text from which I read, Lieberman repeated "if the Union forces us to incur costs [illegible] we cannot afford, we would have no choice but to close down."

with them, although they readily conceded that he used, or could have used, the words "meet" or "afford." On the other hand, Dominy's explanation that he chose that language as a possible legal alternative on the advice of counsel was not at all impressive, and it seems extremely doubtful to me that Respondent would take a narrower, more conservative and legalistic approach in its individual contacts with employees during its preelection campaign than it did in its prepared speeches and letters. As indicated above, there is nothing in President Lieberman's speech to employees before the election about union contracts being forced on Respondent, thereby causing it to close down, although "unreasonable demands" and harmful strikes and unpleasant picket lines are skillfully woven into the speech. Dominy also wrote a letter to the employees before the election which, like Lieberman's text, advises them that the plant will close "if the union comes in and forces upon us expenses that we cannot afford" but which contains nothing about signing a contract.

Supervisor Gillis also talked to employees about the Union's efforts to organize the employees and about the coming election. She said that she told "8 or 9" employees that if the Union were to win the election and "demanded more than the company could meet then it might have to close." It is extremely unlikely that she would have assumed the responsibility for taking a course inconsistent with Dominy's by failing to use the words "forced to sign a contract," which Dominy said he was so careful to use with each employee, and this is another reason for not accepting Dominy's version of what he said.

As indicated, I find that Dominy did not carefully stay with a prepared script in his approaches to employees. I find further that in some cases he said the plant would close if the Union won the election and made "unreasonable demands," in others that it would if it demanded "too much money" and in other cases he added language about the company's ability

to "afford" or "meet" the Union's demands. In no case did he mention being "forced to sign a contract."[5]

The question of the property of Dominy's statements to employees about plant closure must be decided in the light of the principles stated in *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575 (1969). There the Court established certain standards for determining whether an employer's statements about the effects of unionization are permissible. The Court stated that any evaluation of employer's statements ". . . must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[6] Accordingly, the Court continued:

> . . . an employer is free to communicate to employees any of his general views about unionization or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization [citation omitted]. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer

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[5] It is not even claimed that he or any other company representative indicated in their remarks, letters or speeches to employees that Respondent intended to bargain with the Union in good faith if it did win the election.

[6] *N.L.R.B. v. Gissel, supra*, 395 U.S. at 616.

a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion and as such without the protection of the First Amendment.[7]

Judged by these standards, Dominy's statements to employees that Respondent would close the plant if the Union won the election and made "unreasonable" demands or demands that Respondent could not "afford" were, in my opinion, unlawful. First, there was no support for Respondent's "basic assumption that the Union, which had not yet presented any demands . . ." would present demands that were unreasonable or which Respondent could not meet.[8] Indeed, Respondent presented no facts in regard to what kind of a wage or other demand it considered reasonable or as to what economic concessions it could afford to make. We do not know whether Respondent's business is extremely profitable or in poor financial condition. Respondent clearly created the impression that it would make a judgment unilaterally on the "reasonableness" of the Union's demands on the basis of undisclosed criteria, and having so decided, closing would inevitably follow.

Second, the statements did not convey a management decision already arrived at to close the plant in the event of unionization, but contained threats to make that decision after the employees had voted in the election and even before collective bargaining ever got started.

Third, the statements are not careful and honest predictions based on known facts, for they are inconsistent with other statements made by Respondent in the campaign. In his letter to employees, Dominy claimed that the benefits which Respondent was supplying at the time were "equal to or superior to the

[7] id. at 618.

[8] ibid.

plants in our area, union or non-union." Lieberman, in his speech to employees before the election, stated that Respondent provided such cost items as wages, insurance, vacations and holidays, "as good as, and, in many instances, superior to" comparable companies, union and non-union. Supervisor Gillis testified that she told employees that she thought the Union would not do them any good because they "were getting as much or more than the (unionized Opelika) plant down the street." Respondent's inconsistency in telling employees at one time and place that they were as well off or better off than employees in union plants, and at other times and places, that the Union will make "unreasonable" demands on Respondent which it cannot afford—that is to say, demands for conditions that the Union has not been able to obtain from employers under contract with the Union—was a misrepresentation designed to deceive the employees, not a carefully phrased prediction based on objective facts of how unionization would result in plant closure.

I conclude that Respondent, by Dominy's statements about closing the plant, violated Section 8(a)(1) of the Act.[9]

[9] *N.L.R.B. v. Gissel, supra; Marathon LeTourneau Company,* 208 NLRB No. 39; *James Hoomain d/b/a Chicago Master Mattress and Furniture Company,* 196 NLRB No. 99. *Texas Industries v. N.L.R.B.,* 336 F.2d 128 (C.A. 5) and cases cited therein relied upon by Respondent, were decided before *Gissel,* but in any case, for the reasons already stated, I do not consider Dominy's statements in this case to fall within the area found protected by the court in *Texas Industries.* See for example, *N.L.R.B. v. Birdsall Construction Company* (C.A. 5), decided November 20, 1973, 84 LRRM 2801. For another Court of Appeals case decided since *Gissell,* see *N.L.R.B. v. Lenkurt Elec. Company, Inc.,* 438 F. 2d 1102, 1105 (C.A. 9, 1971). There the Court stated that it read *Gissel* as establishing two standards by which an employer's speech may be objectionable. It explained that an employer may not indicate in his predictions that he will, of his own volition and for his own reasons, inflict adverse consequences upon his employees if they chose the Union, and also he may not, in the absence of a factual basis thereof, predict adverse consequences arising from sources outside his volition and control. Dominy's statements were objectionable under both standards, but more clearly under the second. Cf. *N.L.R.B. v. River Togs, Inc.,* 382 F. 2d 198 (C.A. 2).

4. **Promises of benefits**

Prior to July 1973, employees with 6 months of service received a one week vacation with pay in the summer and two at Christmas time. Memorial Day has never been a paid holiday. The complaint alleges that Supervisor Gillis, in May 1973, promised employees a 2-week summer vacation and a paid Memorial Day holiday if the Union were not designated in the coming Board election.

Eight employees testified on this subject as follows:

Stanley. Just before the election Gillis, first asking her if she had "heard the good news," told her that the employees would get 2 weeks vacation in July and one in December.

Hinson. Shortly before the election, Gillis told her that she had been directed to tell her that if the Union were defeated, the employees would receive a 2 week vacation and Memorial Day as a holiday.

Floyd. She had two conversations with Gillis about it. In the first, Gillis told her about the paid vacation and extra holiday if the Union were voted down. Later, other employees asked Gillis about the matter, but Gillis did not answer them. Floyd then called Gillis to her machine and asked her to repeat what she had told her earlier, which Gillis did. Floyd asked Gillis why she had not given the same information to the other employees. Gillis replied that Respondent's attorney had advised her not to tell everyone but only those she thought were against the Union.

Snell. Although not alleged in the complaint, Snell testified that Dominy told her in April 1973 that he had an understanding with President Lieberman that the employees would get an extra paid holiday and 2 weeks vacation if the Union lost the election.

Austin. A week or so before the election, Gillis asked her if she had heard the "good news," that is, if the Union lost the election, the employees would get a 2 week vacation in July and a paid Memorial Day holiday the following year.

Peavey. She had heard talk in the department previously about it, but 2 weeks before the election, Gillis mentioned "good news," and then stated that if the Union did not come in, the employees would get 2 weeks vacation in July.

Davis. Gillis, on the day before the election, told her that she had "good news," because she had been called to the office and informed that the employees would get an extra paid holiday on Memorial Day and 2 weeks vacation in July, if the Union lost the election.

Lindsey. When Gillis asked her if she had heard the "good news", she did not reply because she had already heard other employees talking about getting a 2 week vacation if the Union was not voted in.

Dominy testified that because of pressure from Lieberman, who complained to him about the need to have sample garments ready in late December or early January, he and Lieberman agreed, in January 1973, to shift the 2 week Christmas vacation to July and give the employees only one week off at Christmas time. He said he told two supervisors about this decision but did not announce it to employees before June 15 because some employees would suffer because of the decision. He explained that since 6 months of employment is necessary to qualify for vacation, approximately 25 employees, who had not that much service in July, would get no vacation then, but would have gotten 2 weeks instead of one in December if they were still employed, and if the policy had not been changed. He also denied that he had told anyone that they would receive a 2 week vacation in July or get Memorial Day as a paid holiday if the Union were defeated in the election.

Gillis testified that she learned of the change in Respondent's vacation policy from Dominy in early March. She said she did

not tell employees about it until about 2 weeks before the election when she spoke to a group of 8 to 10 employees who had happened to come together and who asked her about the company's vacation plans. When they did, she said she explained the change in policy and the basis for it, describing the change as "good news" for those who thought it was good news. She said that some employees liked the change and others did not. For herself, she was indifferent about the change, and she said she had told Dominy that most of the employees would be against it. Like Dominy, she also said a substantial number would receive no vacation in July because they had not been employed long enough. She denied that she had told any employee that if the Union lost the election there would be an added paid holiday.

I credit Dominy's testimony that the change in vacation scheduling was decided on no later than January 1973, and Gillis' testimony that she and another supervisor learned of it in early March 1973. The testimony is uncontradicted and there is no rational reason to discredit it. I also find on the basis of their testimony that the new policy was not much of a benefit to employees, and that many employees, who would have gotten 2 weeks vacation in December under the old policy, got no vacation in July of 1973 and only one week in December 1973 because of their hiring dates.

On the other hand, I credit the testimony of the employees that Gillis approached them individually and told them about the vacation change. Although I think that Snell was probably confusing her conversations with Dominy with one she had with Gillis, I was impressed by the testimony of the other employee witnesses, particularly Hinson's and Floyd's. Floyd had two conversations with Gillis, and she testified logically and with apparent sincerity. Although Gillis testified generally that she had no individual conversations with employees in this area, she did not specifically deny Floyd's testimony about why she

(Gillis) had told only selected employees about the rescheduling of vacations. The words "good news" also appear in the testimony of most of the employee witnesses, and Gillis admitted she used them. This is some indication that their testimony was not contrived. I credit them, and I find that Gillis, shortly before the election, informed employees that she had "good news" for them because she had been told to tell them that they would get 2 weeks off in July with pay. I also find, contrary to Gillis' denial, and on the basis of the credited testimony of the employees, that when Gillis spread the word about vacation, she added a promise about Memorial Day becoming another paid holiday in 1974, if the Union did not win the election.

Since I have found that Respondent had decided to change its vacation policy before the Union filed for an election and because a substantial number of employees would lose because of the change, no one can be certain why Respondent announced its decision to employees just before the election. The logic of the situation, however, is that information about the change was getting to employees in the plant and that Respondent decided to use it to its advantage in its preelection propaganda, describing it as "good news" for the benefit of those who might prefer to be off in July, rather than in December, and adding a paid holiday to the package to take the sting out of the announcement for those who were indifferent to it or lost by it.

I find that by indicating to employees that they would benefit from Respondent's change in policy and by promising them an additional paid holiday, all on condition that they vote against the Union in the election, Respondent violated Section 8(a)(1) of the Act.

B. **The refusal to bargain**

1. **The appropriate unit**

The complaint alleges, Respondent admits, and I find that all production and maintenance employees of Respondent at its Hawkinsville, Georgia, plant, but excluding office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. **The demand and refusal**

By letter dated April 12, 1973, the Union advised Respondent that it represented a majority of its employees in the unit and asked to meet to discuss a contract covering them. On April 16, 1973, Respondent wrote the Union stating that it refused to recognize it as bargaining agent for the employees because it doubted that the Union represented a majority of employees. As indicated earlier, on April 16, 1973, the Union filed a petition for an election with the Board.

3. **The Union's majority status**

There were 94 persons employed in the appropriate unit who appear on the payroll covering the period April 12 to 16. All 94 also appear on the payroll for the week ending April 27, 1973 which was used in the June 1, 1973, election.

During the course of the hearing, 61 signed authorization cards were admitted into evidence.[10] At the close of the hearing

[10] The cards are so-called "single purpose" cards, clearly authorizing the Union to act as the signer's collective bargaining representative.

it was stipulated that two of the 61 were for persons who were not on the company's payroll at any time material to this proceeding. We start out with 59 designations, therefore, but Respondent questions the validity of the cards on various grounds.

A certain number of employees authenticated their own authorization cards, but the majority of the cards were authenticated by a union representative or another employee. These persons testified credibly that they either saw the employee sign the card or gave it to the employee and received it back already executed. Cards authenticated on such a basis are valid.[11]

Respondent also claims that many of the cards were obtained on the basis of a misrepresentation that if employees signed them they would be given "free insurance" and 2 weeks vacation in the summer. I find no merit in this contention. It is clear from the testimony of Elizabeth Brown that when she was talking about "free insurance" in soliciting employees to sign a union authorization card, she was not promising them an immediate gift but was trying to explain what would happen if the plant were organized and a contract were signed. She said, for example, that she told employees that other union plants had such benefits. Employee Yansom testified that union representative Vanooyen told her that "free insurance" would follow a union contract. It appears that Respondent provides employees with free health and hospitalization insurance for themselves but not for their spouses or other dependents. What the Union was engaging in, it is clear from the context in which the remarks were made, was commonplace election propaganda long found by the Board and courts not to be objectionable.[12]

[11] *N.L.R.B. v. Economy Food Center*, 333 F. 2d 468, 471 (C.A. 7); *N.L.R.B. v. Somerset Shoe Co.*, 111 F. 2d 681, 687 (C.A. 1); *Howell Chevrolet*, 204 F. 2d 79, 85-86 (C.A. 9); *Don the Beachcomber*, 163 NLRB No. 275.

[12] *N.L.R.B. v. Gilmore Industries, Inc.*, 341 F. 2d 256 (C.A. *Wilson Athletic Goods Mfg. Co. v. N.L.R.B.*, 164 F. 2d 637, 639-6); *Olson Rug Co. v. N.L.R.B.*, 260 F. 2d 255, 267 (C.A. 7); 640 (C.A. 7).

Respondent also contends that the employees who signed cards were misled because the back of the card "indicates with definiteness" that the Union already has a collective bargaining contract with Respondent. On the reverse of the card is a checkoff authorization which authorizes dues deductions, in accord with existing law, "for the period of one year until the termination of the collective-bargaining agreement between my Employer and the Union, whichever occurs sooner. . . ." The Union has been trying to organize Respondent's employees for 5 years or more, and it is more than difficult to believe than anyone would be misled by such language into believing that, somehow or other, contrary to both the Union's and the Employer's preelection propaganda, a collective bargaining contract existed between the parties. This attack on the cards is without foundation.

Twelve of the 59 card signers revoked their authorizations by signing letters, which found their way into the Union's files, requesting that their cards be returned to them promptly. I have found above that Respondent did not improperly assist the employees in revoking their authorizations, and I reject, therefore, General Counsel's contention that the revocations are invalid on that ground.

General Counsel also argues that since only one of the withdrawal letters is dated, Respondent has failed to establish that the purported withdrawals were executed and delivered prior to the demand date. Although only a few of the persons who signed such letters testified, I find sufficient probative evidence in the circumstances disclosed in the record to compel the finding that each document was executed by the employee in the unit whose name it bears and delivered to the Union prior to the date on which Respondent received the Union's demand for bargaining.

The names on the letters are the same as those on union cards and on the payrolls in evidence. Union Organizer Van-

ooyen testified that eight of the letters were handed to her by the employee who signed them, and she said she "imagined" that McGill, another organizer, received the others. A ninth signer of a withdrawal, Lois Taylor, identified her signature on the revocation. No one claims that the signatures on the letters are not authentic or that the signers were not employed by Respondent. Even if they did, the circumstances described would cause me to reject that contention.

The withdrawals were signed before April 16 because Vanooyen testified that it was before April, probably in "February or March," that she received them. I also note that none of the 12 authorization cards signed by employees who also signed withdrawal letters contains a Board date-stamp on its back as do all the other cards presented to the Board as a showing of interest in support of the Union's petition for an election. The cards are date-stamped April 16. It is a fair inference from these facts that the Union had in its possession all 12 withdrawals before April 16 and did not present the cards to the Board for that reason.

For the reasons stated, and particularly in the absence of any evidence to the contrary, I find that employees Simmons, Lemmon, Dellemar, Lois Taylor, Mildred Stanley, Blackshear, Wanda Taylor, Emily Harris, Flemming, Beatrice Taylor, Liza Pitts and Nadine Moss executed and delivered revocations of their union authorization before Respondent received the Union's demand.

Twelve revocations, plus two signers not on the appropriate payroll reduces the valid cards to 47, not a majority, but Lois Taylor signed another authorization card on April 24, 1973. If her card and the cards of employees Jones, dated 4-14-73, Harris, dated 4-26-73, Davis, dated 5-8-73, and Lindsey, dated 5-8-73, are valid, on the theory that the Union's demand was a continuing one, then the Union had majority of designations prior to the middle of May.

When a demand for sole bargaining is or is not a "continuing" one, is not always clear from the cases.[13] It seems to me that in a situation such as we have in this case a realistic legal appraisal of the position of the parties after the Union's demand for bargaining was refused and at the time they executed an agreement for a consent election is that the Union had temporarily suspended its request for immediate recognition in order to resolve the question quickly and peaceably within the framework of the Act. Implicit in the agreement, however, was a condition that neither party thereafter commit serious unfair labor practices undermining to the other and precluding the holding of a fair election. If an employer does act contrary to the purpose and design of the agreement by engaging in serious unfair labor practices, then it can be said with reason that the Union's original claim is revived and, in that sense, can be said to continue.

No unfair labor practices were committed prior to the middle of May 1973, but after the agreement for consent election was approved on May 9, Respondent commenced to make threats that the plant would close if the Union won the election, and it also promised employees benefits if the Union did not. In those circumstances another demand for recognition would be futile, and because the condition on which the agreement was predicated failed, the Union's demand was legally reactivated.

I find that Lois Taylor's card and the cards of the four other employees who signed after the Union's first demand for recognition and prior to the commencement of the employer's unfair labor practices may be counted in computing the total number

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[13] See *Scobell Chemical Company, Inc. v. N.L.R.B.*, 267 F. 2d 922 (C.A. 2); *Essex Wire Corporation*, 188 NLRB 397, 412; *Hardy-Herpolsheimer Division of Allied Stores of Michigan, Inc.*, 173 NLRB 1109, 121-22.

of valid cards. This results in a total of 48 valid cards, and I find, on that basis, that the Union represented a majority of employees in the unit on May 8, 1973.[14]

4. The appropriateness of a bargaining order under the circumstances of this case.

In *Gissel, supra,* the Court sustained the Board's remedial authority to issue a bargaining order, in cases like this one, where an employer rejects a valid card majority and commits unfair labor practices "that interfere with the election process and tend to preclude the holding of a fair election."[15] The Court held that a bargaining order would be appropriate in either of two situations: first, in "exceptional" cases where there was no 8(a)(5) violation but the unfair labor practices were so "outrageous" and "pervasive" that "their coercive effects cannot be eliminated by the application of traditional remedies,"[16] and second, "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."

Respondent contends that no bargaining order should issue here because its election campaign was "mild" and was not one

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[14] Respondent placed into evidence authentic handwriting specimens of employees Blackshear and Hursey in order to establish that they had not actually signed the union authorizations in evidence. Although I have found that Blackshear revoked her card, which makes it unnecessary to meet this contention, the employees who testified about Blackshear's execution of a card appeared to me to be telling the truth as they remembered it, and, although Blackshear appears to have difficulty in signing her name, it is not clear enough to me, a non-expert, that the signature on the union card is not hers. In Hursey's case, I have no question on all. The signatures in the employer's files give me no reason to doubt the testimony of employee Collins, who obtained the authorization card from her.

[15] 395 U.S. 575, 594.

[16] 395 U.S. at 613-614.

that could prevent a fair election. I have found, however, that Respondent made statements to many employees just prior to the election threatening to close the plant if the Union won the election, and it also promised them benefits if it did not.[17] In his dissent in *General Stencils, Inc.*,[18] Board Chairman Miller, in discussing the remedy problem in cases where threats of reprisal had been made, stated that "a threat of loss of employment for some or all unit employees (is) of the gravest consequences. The threat of plant closing has long been recognized as a uniquely destructive tool." He added that "the threat of plant closure must be regarded, for *Gissel* purposes, as more coercive than any other threat, and more likely to have a lasting impact on an employee group." In my opinion, the Board would unanimously hold that the threats to close the plant in the instant case, with or without the promise of benefits, would have such an impact on employees that the "possibility of erasing" its effects and "of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . ."[19] Accordingly, I will so recommend.

5. **Unilateral change in conditions of employment.**

On or about June 15, 1973 Respondent, unilaterally and without prior notice to, or consultation with the Union, an-

[17] In *Olin Conductors*, 185 NLRB 467, relied on by Respondent, where the Board did not issue a bargaining order, there was no threat to close the plant.

[18] 195 NLRB 1109, 1113.

[19] 395 U.S. at 614-615. In *N.L.R.B. v. General Stencil, Inc.*, 438 F.2d 895, 902 (C.A. 2), the Court, in remanding the case to the Board for reconsideration of its order to bargain, stated that "widespread dissemination of the threat of plant closure . . . would . . . clearly support a bargaining order. . . ."

nounced and granted to all eligible employees a 2 week paid vacation from June 29, 1973, through July 16, 1973. Since Respondent was under a duty to bargain with the Union as the statutory representative of employees in the unit at that time, Respondent's actions in this regard violated Section 8(a)(1) and (5) of the Act.

IV. **The Representation Case.**

Having found that Respondent engaged in serious violations of Section 8(a)(1) of the Act during the last 2 weeks in May, 1973, by threatening employees with economic reprisals if the Union won the election and by promising them benefits if it did not, it follows that such conduct interfered with the employees' free choice of a collective bargaining representative and that the results of the election must be set aside on the basis of the Union's objections.

In view of my recommendation, hereinafter set forth, that Respondent be required to recognize and bargain with the Union, I shall recommend that the petition in Case No. 10-RC-9582 be dismissed, and that all proceedings in connection therewith be vacated. *Irving Air Chute, Inc.*, 149 NLRB 627.

V. **The Remedy**

Having found that Respondent violated Section 8(a)(1) and (5) of the Act, I shall recommend that Respondent cease and desist from engaging in such unfair labor practices and from like or related unfair labor practices and to take certain affirmative actions which I find will effectuate the policies of the Act. I shall also recommend that Respondent bargain collectively, upon request, with the Union as the exclusive bargaining representative of the employees in the unit found appropriate

herein, and to embody any understanding reached in a signed agreement.

Upon the basis of the foregoing findings of fact and on the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. By threatening employees with plant closure if they selected the Union in a Board election, Respondent violated Section 8(a)(1) of the Act.

4. By promising employees additional benefits if they rejected the Union in the Board election, Respondent violated Section 8(a)(1) of the Act.

5. By refusing to recognize and bargain with the Union as the exclusive bargaining representative of employees in the appropriate unit, Respondent violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally and without prior notice to, or consultation with the Union, changing terms and conditions of employment, Respondent violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

Upon the foregoing findings of fact, conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I recommend the following:

ORDER[20]

Respondent, Jimmy-Richard Co., Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure if they designate the Union in a Board-conducted election.

(b) Promising employees benefits if they reject the Union in a Board-conducted election.

(c) Refusing to recognize and bargain with the Union as the exclusive representative of employees in the unit found appropriate herein.

(d) In any like or related manner interfering with, restraining or coercing its employees in their exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of the employees in the unit found appropriate, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Hawkinsville, Georgia, place of business, copies of the attached notice marked "Appendix."[21] Copies of

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[20] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice read-

said notice, on forms provided by the Regional Director for Region 10, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

I Further Recommend that the election conducted in Case No. 10-RC-9582 on June 1, 1973, be set aside and that proceeding be vacated and the petition dismissed.

Dated at Washington, D. C. Feb. 11, 1974.

/s/ GEORGE J. BOTT
GEORGE J. BOTT
Administrative Law Judge

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ing "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."'

Supreme Court, U. S.
FILED
MAY 6 1976
MICHAEL RODAK, JR., CLERK

No. 75-1442

In the Supreme Court of the United States

OCTOBER TERM, 1975

JIMMY-RICHARD CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-17) is reported at 527 F.2d 803. The Board's decision and order (Pet. App. A-18 to A-46) are reported at 210 NLRB 802.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1975. A petition for rehearing was denied on January 15, 1976. The petition for a writ of certiorari was filed on April 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a), which contains a cross reference to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the employer's threats of plant closure and other unfair labor practices precluded a fair election and thus warranted issuance of a bargaining order based on the union's authorization card showing of support by a majority of the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 3.

STATEMENT

1. Petitioner Jimmy-Richard Co., Inc. (the "Company") manufacturers men's and boys' apparel in Hawkinsville, Georgia. On April 12, 1973, the Amalagamated Clothing Workers of America, AFL-CIO (the "Union") advised the Company that it represented a majority of its 94 production and maintenance employees. The Union requested a meeting with the Company for purposes of collective bargaining (Pet. App. A-36). On April 16, the Company notified the Union by letter that it refused to recognize or meet with the Union because it doubted that the Union represented a majority of the employees (*ibid.*). That same day, the Union filed an election petition with the Board, and the Board scheduled a representation election for June 1 (Pet. App. A-20 to A-21).

During the two weeks prior to the election, plant manager Durwood Dominy spoke to approximately 60 employees on various occasions (Pet. App. A-26; A. 188-189).[1]

[1] "A." refers to the transcript of the unfair labor practice hearing reproduced in Volume I of the appendix in the court of appeals. The portion of Volume I containing that material has been lodged with the Court.

In each instance Dominy told the employees that the plant would close down under certain conditions. On some occasions he told the employees that the plant would "close up and go back to St. Louis" if the Union won the election and demanded "too much money," and on others he stated that the Company would close the plant if the Company could not "meet" or "afford" the Union's demands (Pet. App. A-26 to A-29; A. 50-51, 57-58, 63, 67-68, 81-82, 84-85, 88-89, 94-95, 97, 102-103, 126, 130, 133-134, 152-153, 155-156).

Under the Company's existing vacation policy, the employees received a one-week paid vacation in the summer and two weeks at Christmas (Pet. App. A-32; A. 148, 179-180). Memorial Day has never been a paid holiday for Company employees (Pet. App. A-32; A. 185). Shortly before the election, supervisor Virginia Gillis approached approximately nine employees on separate occasions and told them she had " good news" for the employees. The "good news" was that they would have their two-week vacation in July rather than at Christmas, and that they would have Memorial Day as a paid holiday beginning in 1974, provided the Union lost the election (Pet. App. A-32 to A-35; A. 133, 146-147, 208-212). Employee Floyd was one of those to whom Gillis made these remarks. When Floyd discovered that this information had not been conveyed to certain other employees she asked Gillis why all the employees had not been told (Pet. App. A-32; A. 209). Gillis replied that she had been instructed to tell "just the ones that she thought wasn't for the Union" (*ibid.*).

The election was held at the beginning of June. The Union lost by a vote of 50 to 42 (Pet. App. A-21). Two weeks later the Company granted to all eligible employees a paid two-week vacation from June 29 through July 16 (Pet. App. A-42 to A-43; A. 180).

2. The Board, adopting the findings of the Administrative Law Judge, found that the Company had violated Section 8(a)(1) of the Act by threatening employees with plant closure if they selected the Union and by promising employees an additional paid holiday and a new vacation policy, provided the Union was not chosen (Pet. App. A-31, A-35, A-44). The Board also found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees and by unilaterally changing terms and conditions of employment (Pet. App. A-42 to A-43, A-44). The Board ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. A-45).

In concluding that a bargaining order was appropriate, the Board rejected the Company's contention that the Union's showing of majority support was tainted because it solicited cards on the misrepresentation that employees who signed would receive free insurance (Pet. App. A-37). The Board found, instead, that the Union was merely explaining benefits that could result if the plant were organized and a contract signed; it was "commonplace election propaganda long found by the Board and courts not to be objectionable" (*ibid.*). The Board also rejected the Company's assertion "that the employees who signed cards were misled because the back of the card 'indicates with definiteness' that the Union already has a collective bargaining contract with [the Company]" (Pet. App. A-38). The Board explained (*ibid.*): "On the reverse of the card is a checkoff authorization which authorizes dues deductions, in accord with existing law, 'for the period of one year until the termination of the collective-bargaining agreement between my Employer and the Union,

whichever occurs sooner . . . .' The Union has been trying to organize [the Company's] employees for 5 years or more, and it is more than difficult to believe tha[t] anyone would be misled by such language into believing that, somehow or other, contrary to both the Union's and the [Company's] preelection propaganda, a collective bargaining contract existed between the parties." The Board further found that the Union's demand for recognition was a continuing one and that, although the Union did not possess majority support on the date that if first requested recognition, it possessed 52 valid cards by May 8, 1973 (Pet. App. A-38 to A-41).[2]

Finally, the Board rejected the Company's argument "that no bargaining order should issue here because its election campaign was 'mild' and was not one that could prevent a fair election" (Pet. App. A-41 to A-42). The Board concluded that "the threats to close the plant in the instant case, with or without the promise of benefits, would have such an impact on employees that the 'possibility of erasing' its effects and 'of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order ...." (Pet. App. A-42, quoting from *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 614-615).

3. The court of appeals, with one judge dissenting in part, held that "the facts of this case [are] squarely within the parameters established in *Gissel*" (Pet. App. A-2). It therefore affirmed both the finding of unfair

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[2]Although the Administrative Law Judge stated that the Union had 48 valid cards (Pet. App. A-41), the court below correctly noted (Pet. App. A-6, n. 5) that this is a mathematical error; the discussion at Pet. App. A-38 to A-39 makes it clear that he validated 52 cards. In either case, the Union possessed majority support at the relevant time, for the unit consisted of 94 employees (Pet. App. A-36).

labor practices and the bargaining order. In upholding the bargaining order, the court stated (Pet. App. A-7):

> The employer's unfair labor practices—coercive threats, promises of benefits, and unilateral changes in employment conditions—occurred after the consent election was approved on May 9 and after the Union had obtained majority status. These practices reasonably account for the union's losing the election by a narrow vote of 50 to 42. [Citation omitted.] The company argues that the close vote indicates that its unfair labor practices were minor and not sufficient to entitle the union to a bargaining order. It seems more logical to conclude, however, that the union's slight majority could have been eroded, and was in fact destroyed, by the employer's threats of closing or moving the plant. Similarly, the promise of an additional holiday made to a small number of employees could have affected some of the six critical votes.

ARGUMENT

The question petitioner seeks to present (Pet. 2-3)—whether a bargaining order is appropriate where the employer made a threat of plant closure but there were "union misrepresentations in obtaining authorization cards" and the Union failed "to hold a majority of the employees at the time it demanded recognition" — is not properly before the Court. The Board found, and the court of appeals sustained the finding, that the Union did not make misrepresentations in soliciting cards

and that it did represent a majority of the employees at a time when its demand for recognition was in force.[3]

The only issue actually presented is whether the Board properly found that the Company's unfair labor practices were sufficiently serious to merit a bargaining order under the principles of *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575.[4] That issue involves only an application of settled principles to the facts of this case. It therefore does not warrant review by this Court.[5] In any event, *Gissel* made it clear that

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[3]Petitioner appears to contend (Pet. 12-16) that the court of appeals erred by not requiring the Board to explain its "substantial departure" from previous cases. But petitioner has not set this allegation out as a question presented for review. Nor did the Board depart "without explanation" from its own precedents. The propriety of a bargaining order depends upon a careful analysis of the facts of each case. The Board has fully explained its analysis of this case; it was not necessary to recite and "distinguish" all of its prior cases as well.

[4]*Gissel* indicated that a bargaining order is appropriate in both " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," and "cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." 395 U.S. at 613, 615.

[5]*Dawson Metal Products* v. *National Labor Relations Board*, 450 F.2d 47 (C.A. 8), *Arbie Mineral Feed Co.* v. *National Labor Relations Board*, 438 F. 2d 940 (C.A. 8), *Peerless of America, Inc.* v. *National Labor Relations Board*, 484 F.2d 1108 (C.A. 7), and *National Labor Relations Board* v. *Gibson Products Co.*, 494 F. 2d 762 (C.A. 5), relied on by petitioner (Pet. 11-12), did not involve threats of plant closure. In *National Labor Relations Board* v. *General Stencils, Inc.*, 472 F.2d 170, 172 (C.A. 2), also relied on by petitioner (Pet. 12), the court agreed that threats of plant closure are particularly coercive, but found that the threat in that case did not warrant a bargaining order because it was made to only one employee who was about to quit and there was no evidence of wider dissemination. These cases reflect not a difference of principle but merely a difference of result upon applying the established principle to particular facts.

threats of plant closure similar to those the Board found here constituted "threats of reprisal [which] were so coercive that, even in the absence of a §8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." 395 U.S. at 615, 620.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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MAY 1976.

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